

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

LAZ PARKING LTD, LLC,)
Petitioner)
)
v.)
)
COMMONWEALTH EDISON COMPANY,)
Respondent.)
)

Complaint pursuant to Sections 9-250 and 10-108 of the Illinois Public Utilities Act and Section 200.170 of the Rules of Practice of the Illinois Commerce Commission

**LAZ PARKING’S REPLY TO
COMED’S RESPONSE TO LAZ PARKING’S MOTION TO STRIKE PORTIONS OF
COMED’S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING AFFIDAVITS
AND TO STRIKE SCHEDULE FOR SAME**

LAZ Parking LTD, LLC (“LAZ Parking”) for its Reply (this “Reply”) to ComEd’s Response (“Response”) to LAZ Parking’s Motion to Strike Portions of ComEd’s Motion for Summary Judgment and Supporting Affidavits and to Strike Schedule for Same (LAZ Parking’s “Second Motion to Strike”), states as follows:

1. Procedural Background

On May 2, 2012, LAZ Parking filed its complaint (the “Complaint”) against Commonwealth Edison Company (“ComEd”) to recover \$259,938 wrongfully back-billed to LAZ Parking by ComEd. The Complaint as originally filed stated five counts. ComEd claimed that LAZ Parking had been billed with an incorrect meter constant, resulting in alleged under-billing of LAZ Parking’s account. (Complaint, Exhibit D). However, ComEd failed to comply

with the accuracy and testing requirements set forth in Part 410 of the Rules of the Illinois Commerce Commission (the “Commission”), and therefore ComEd’s adjustment of its bills to LAZ Parking is unlawful under 83 Ill. Adm. Code Section 410.200(h)(1). (Complaint, Count II).

LAZ Parking served ComEd with discovery in July 2012. LAZ Parking had issues with ComEd’s responses to discovery, and, pursuant to Supreme Court Rule 201(k) and Commission Rule 200.350, from August through early October 2012, LAZ Parking repeatedly requested ComEd to schedule a telephone conference to discuss these discovery issues. ComEd uniformly ignored each of these requests. (See LAZ Parking’s Reply in Support of Motion to Deem Admitted, Exhibits A through D, copies of which are attached as Exhibit A to this Reply).

Due to ComEd’s failure or refusal to confer on discovery issues, on October 5, 2012, LAZ Parking served ComEd with its First Set of Requests for Admission (the “Requests for Admission”). On October 31, 2012, ComEd served on LAZ Parking its responses to the Requests for Admission. On November 12, 2012, LAZ Parking filed its Motion to Deem Admitted Certain Facts Pursuant to Requests for Admission and Responses Thereto (the “Motion to Deem Admitted”). Only after LAZ Parking filed the Motion to Deem Admitted did ComEd finally confer with LAZ Parking regarding discovery issues (November 16, 2012). ComEd filed its Response in Opposition to LAZ Parking’s Motion to Deem Admitted on December 17, 2012.

On June 10, 2013, ComEd filed its “Motion to Dismiss Complaint on the Merits” (ComEd’s “First Motion to Dismiss”).

On June 13, 2013, the Administrative Law Judge (the “ALJ”) ruled that ComEd’s First Motion to Dismiss would be held in abeyance pending resolution of LAZ Parking’s Motion to Deem Admitted.

Oral argument on the Motion to Deem Admitted was held on June 28, 2013.

At a status hearing held on December 4, 2013, Complainant moved to voluntarily dismiss Counts I, III, and IV from the Complaint. Counts II and V remain.

On February 13, 2014, the ALJ issued a ruling granting LAZ Parking's Motion to Deem Admitted. The ALJ specifically found that

- (1) LAZ Parking had met the standard set forth in Supreme Court Rule 201(k) to make a reasonable attempt to resolve discovery differences with ComEd prior to bringing the Motion to Deem Admitted, (ALJ Order, February 13, 2014, pg. 2; copy attached as Exhibit B hereto);
- (2) Supreme Court Rule 216 ("Rule 216") was controlling in this matter (*id.*, see Exhibit B to this Reply);
- (3) *Vision Point of Sale, Inc. v. Haas*, 223 Ill. 2d 334, 875 N.E.2d 1065 (2007), cited by ComEd in support of its contention that it should be allowed to amend its responses to conform them to Rule 216, did not support ComEd's argument and was inapplicable to the Rule 216 issues in this docket (ALJ Order, February 13, 2014, pgs. 3-4; see Exhibit B to this Reply); and
- (4) the deficiencies in ComEd's responses to the requests to admit were more than mere technicalities and therefore were admissions as provided in Rule 216. (ALJ Order, February 13, 2014, pg. 4; see Exhibit B to this Reply).

On February 14, 2014 LAZ Parking filed its Motion to Strike ComEd's First Motion to Dismiss. On February 20, 2014, the ALJ struck the briefing schedule on ComEd's First Motion to Dismiss pending resolution of the Motion to Strike ComEd's First Motion to Dismiss.

On February 27, 2014, ComEd filed its Motion to Reconsider (ComEd's "Motion to Reconsider") ALJ's February 13, 2014 Order granting LAZ Parking's Motion to Deem Admitted. On February 28, 2014, the ALJ issued a ruling holding in abeyance the briefing schedule on the Motion to Strike ComEd's First Motion to Dismiss and establishing a briefing schedule on ComEd's Motion to Reconsider, which was subsequently fully briefed.

On March 9, 2015, the ALJ entered an order denying ComEd's Motion to Reconsider and granting ComEd leave to file an amended motion to dismiss, a copy of which is attached as Exhibit C to this Reply. In this order the ALJ found that "[ComEd] has not produced any new arguments to support their position that the Commission is expressly prohibited from using Supreme Court Rules and the Rules of Civil Procedure." (ALJ Order, March 9, 2015, pg. 3; see Exhibit C to this Reply). Furthermore, the ALJ found that ComEd's request to cure its answers to the requests to admit would run afoul of the integrity of the fact-finding process under Commission Rule 200.340. (ALJ Order, March 9, 2015, pg. 3; see Exhibit C to this Reply).

On April 30, 2015 ComEd filed its Amended Motion to Dismiss on the Merits (ComEd's "Second Motion to Dismiss").

On May 14, 2015, LAZ Parking filed its Motion to Clarify, to Strike and To Continue Generally the Hearing on ComEd's Amended Motion to Dismiss (LAZ Parking's "First Motion to Strike"). LAZ Parking's First Motion to Strike raised three chief problems with ComEd's Second Motion to Dismiss. First, ComEd's pleading was legally unintelligible because it jumbled together elements of a motion to dismiss for failure to state a claim with elements of a motion for summary judgment in a hybrid motion prohibited by Illinois Code of Civil Procedure Section 2-619.1. Second, ComEd's Second Motion to Dismiss impermissibly sought to place in controversy its Rule 216 judicial admissions. Finally, the affidavits that ComEd had submitted in support of its Second Motion to Dismiss were fatally deficient in numerous respects.

2. ComEd's Motion for Summary Judgment

On May 29, 2015, a status hearing in this Docket was held at the Commission's offices. At that time both ComEd's Second Motion to Dismiss and LAZ Parking's First Motion to Strike

were pending. ComEd agreed that by June 8, 2015, it would decide whether it was going to either (1) stand by its Second Motion to Dismiss and file a response to LAZ Parking's First Motion to Strike, or (2) file an amended motion to dismiss. In either case, ComEd's reply to the Motion to Clarify and Strike, or its amended motion to dismiss, would be due on June 30, 2015. On June 8, 2015, ComEd's counsel emailed a notice that ComEd would be filing an amended motion to dismiss.

On June 30, 2015, ComEd filed its Motion for Summary Judgment (ComEd's "Motion for Summary Judgment"). At the May 29, 2015 status hearing and in its June 8, 2015 emailed notice, ComEd misrepresented to both the Commission and LAZ Parking its intentions regarding LAZ Parking's First Motion to Strike. By repeating its attacks on its Rule 216 admissions and proffering affidavits that still did not comply with Supreme Court Rule 191(a), ComEd simply repeated the violations of its Second Motion to Dismiss that were the subject of LAZ Parking's First Motion to Strike. ComEd evidently thought it could save itself the bother of having to respond to LAZ Parking's First Motion to Strike, but its not-so-artful dodge doesn't work. To answer ComEd's attempted dodge of LAZ Parking's First Motion to Strike, it is incorporated by reference into LAZ Parking's Second Motion to Strike (pg. 8).

3. ComEd's Waste of Commission Resources and Imposition of Unnecessary Delays

ComEd claims that LAZ Parking is wasting "scarce Commission resources," adding further "unnecessary delay" to this proceeding, and disrupting the schedule. (ComEd Response,

pg. 3). Coming from ComEd, such accusations are more than a bit rich. It's like listening to Donald Trump chide someone for excessive self-admiration.

From the very beginning of this case ComEd has done nothing but waste time and Commission resources and cause unnecessary delays. ComEd ignored LAZ Parking's repeated requests to confer on outstanding discovery issues, which behavior triggered LAZ Parking's issuance of Rule 216 requests to admit in the first place. Then, continuing its cavalier attitude toward this case, it failed to conform its responses to LAZ Parking's requests to admit to the requirements of Rule 216. Only *after* LAZ Parking filed its Motion to Deem Admitted did ComEd finally deign to confer with LAZ Parking on discovery issues.

ComEd fought LAZ Parking's Motion to Deem Admitted with objections to the application of Rule 216 in Commission proceedings, despite the express authorization to use them in Commission Rule 200.360(c). Without a second thought for consistency, ComEd worked itself into a lather arguing that Supreme Court Rule 216 had no place in Commission proceedings, while Supreme Court Rule 137, under which it sought to impose sanctions on LAZ Parking, did. ComEd's incoherent, if not schizoid attempt to simultaneously reject and endorse the same set of rules in the same proceeding did not escape the notice of the ALJ.¹ ComEd's Response shows that it still shapes its view of the applicability of any rule strictly according to its own convenience.

¹ “[ComEd] has not reconciled why the Commission cannot apply Rule 216 while holding a contradictory position that the Commission should sanction LAZ Parking pursuant to Rule 137.” (ALJ Order, February 13, 2014, pg. 3; see Exhibit B to this Reply).

Having lost the Motion to Deem Admitted, which included more than an hour of ComEd oral argument (see Transcript, June 28, 2013, pgs. 50-112), ComEd then filed its Motion for Reconsideration of that ruling, which it also lost. As the ALJ stated, ComEd's Motion for Reconsideration provided no new arguments to support its position. (ALJ Order, March 9, 2015, pg. 3; see Exhibit C to this Reply).

When it comes to wasting Commission resources and unnecessarily delaying this proceeding, there can be no more conspicuous example than that of Commonwealth Edison Company.

4. ComEd's Re-Litigation of Its Rule 216 Admissions

ComEd claims that it is "not re-litigating or re-arguing that which it already argued before the ALJ." (ComEd Response, pg. 6). Given ComEd's continued challenges to its Rule 216 admissions, after two complete rounds of briefing, extensive oral argument, and two ALJ orders against it in this docket, such a statement borders on delusional. But rather than play ComEd's Rule 216 broken record, LAZ Parking has prepared and attached as Exhibit D to this Reply the litany of ComEd's Rule 216 arguments together with chapter and verse on their location in the record.² Exhibit D hereto indicates those ComEd pleadings filed after March 9, 2015, the date of the ALJ's denial of ComEd's Motion for Reconsideration, in which it attempts to re-litigate Rule 216 issues.

Because ComEd simply dodged responding to LAZ Parking's First Motion to Strike, that motion is incorporated by reference in LAZ Parking's Second Motion to Strike (pg 8). Despite

² If ComEd perseverates in its Rule 216 obsession, this chart may save it a bit of time: rather than continue to repeat its Rule 216 objections in ever more numerous and verbose ways, it can simply refer to the argument number as shown in Exhibit D to this Reply.

ComEd's spurious arguments to the contrary, Illinois law is clear that an admission pursuant to a request to admit facts operates as a judicial admission that is considered incontrovertible either at trial or in a motion for summary judgment. (*See* LAZ Parking's First Motion to Strike, pgs. 7 to 10).

ComEd states in its response that "at some point, all litigation must come to an end." (ComEd Response, pg. 13). Unfortunately, ComEd exempts itself from its own strictures.

5. Portions of ComEd's Motion for Summary Judgment Must Be Stricken

ComEd complains that LAZ Parking did not show the particular provisions of ComEd's Motion for Summary Judgment to be stricken. Although LAZ Parking's original Motion to Strike identified with sufficient particularity those parts of ComEd's Motion for Summary Judgment and related exhibits that were to be stricken, Exhibit E to this Reply confirms those deletions.

6. ComEd's Motion for Summary Judgment Was Filed in June 2015, Not in 2012

According to e-Docket and ComEd's own notice of filing and certificate of service, its Motion for Summary Judgment was filed on June 30, 2015. For reasons known only to itself, ComEd asserts that its Motion for Summary Judgment was really filed at some point in 2012, and that LAZ Parking is three years late in responding to it. (ComEd Response, pgs. 11-15). ComEd cites no legal authority for changing the relevant filing date from June 30, 2015 to some unspecified date in 2012. However, until such time as ComEd can show that its Motion for Summary Judgment was, in fact, filed in 2012, the Commission has to go with the June 30, 2015 filing date reflected in e-Docket and ComEd's own notice of filing and certificate of service, and it must dismiss any assertion by ComEd to the contrary as a complete and ridiculous canard.

7. Conclusion

Wherefore, LAZ Parking respectfully requests the Commission to enter an order:

1. Reaffirming that ComEd's Rule 216 admissions are judicial admissions and are incontrovertible by ComEd;
2. Striking from ComEd's Motion for Summary Judgment and its supporting affidavits those portions thereof identified in this Motion;
3. Prohibiting ComEd from placing its Rule 216 admissions in controversy in any pleadings or other filings in this Docket;
4. Striking the briefing schedule originally established for ComEd's Motion for Summary Judgment pending resolution of the issues raised by this Motion, and to allow LAZ Parking time to obtain counter-affidavits, conduct additional discovery and depose ComEd's witnesses; and
5. For such other relief as the Commission deems just and proper.

Dated this 31st day of July, 2015

Respectfully submitted,

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Attachments:

- Exhibit A – Copies of Exhibits A-D of LAZ Parking's Motion to Deem Admitted
- Exhibit B – February 13, 2014 Order of Administrative Law Judge Granting LAZ Parking's Motion to Deem Admitted
- Exhibit C – March 9, 2015 Order of Administrative Law Judge Denying ComEd's Motion for Reconsideration of February 13, 2014 Order
- Exhibit D – Chart of ComEd's Re-Litigation of Commission's Previous Rule 216 Orders
- Exhibit E – Copy of Redacted ComEd Motion for Summary Judgment and Related Affidavits Reflecting Portions That Must Be Stricken